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No. 80-

IN THE

Supreme Court of the United States

EDITH M. MARSCHAK, etc., *et al.*

Petitioner,

vs.

KIRKLAND and ELLIS, a Partnership, and
WESTINGHOUSE ELECTRIC CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MARSHALL PATNER
55 East Monroe Street
Suite 4005
Chicago, Illinois 60603
312/372-6475

Attorney for Petitioner

Pandick Press Midwest, Inc., Chicago • 454-7600

QUESTIONS PRESENTED

For the purposes of determining diversity of citizenship in a derivative shareholders action:

I. If there is no allegation of wrongdoing against corporate management, is denial of realignment of the corporation as a party plaintiff justified on the basis of antagonism presumed to exist merely because the corporation did not file suit in response to the shareholders' Rule 23.1 demand?

II. Is the determination of whether the corporation is antagonistic to the suit to be made on the basis of the complaint and any responsive pleading, or in an inquiry considering proceedings extrinsic to these initial pleadings.

INDEX.

	PAGE
Questions Presented	i
Index	ii
Table of Authorities	iii
Prayer for Issuance of the Writ	1
Opinions	2
Jurisdiction	2
Statutes Involved	2
Statement of The Case	4
Reasons for Granting the Writ	7
Conclusion	10

APPENDICES

	PAGE
Appendix A, Opinion of The Court of Appeals	1a-9a
Appendix B, The Opinion of The District Court	1b-6b
Appendix C, Shareholders Rule 23.1 Demand	1c-2c
Appendix D, Corporation's Answer To Demand	1d-2d

TABLE OF AUTHORITIES.

	PAGE
Cases.	
Central R. Co. v. *Mills,* 113 U.S. 249 (1885)	8, 9
Doctor v. *Harrington,* 196 U.S. 579 (1905)	8, 9
Hawes v. *Oakland,* 104 U.S. 450 (1881)	9
Hoefferle Truck Sales v. *Divco-Wayne,* 523 F.2d 543 (7th Cir. 1975)	10
Indianapolis v. *Chase Nat. Bank,* 314 U.S. 63 (1941)	10
Julian Sarkas Tarzian, Inc., 353 F.2d 845 (7th Cir. 1965)	9
Koster v. *Lumbermans Mutual Cas. Co.,* 330 U.S. 518 (1947)	7, 8
Lewis v. *Odell,* 503 F.2d 445 (2d Cir. 1974)	7, 8
Mollan v. *Torrance* (US) 9 Whear 537 (1824)	9
Smith v. *Sperling,* 354 U.S. 91 (1957)	7, 8, 9, 10
Swanson v. *Traer,* 354 U.S. 114 (1957)	7, 8, 9, 10
Westinghouse v. *Kerr-McGee, Gulf Oil Corp.* and *Getty Oil Co.,* 580 F.2d 13311 (7th Cir. 1978)	4
Statutes and Rules.	
28 United States Code Section 1332	2, 4
Federal Rules of Civil Procedure 23.1	3, 4, 5, 6, 8

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PETITION FOR WRIT OF CERTIORARI
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Petitioner Edith M. Marschak,[1] prays that a writ of certiorari issue to reverse the judgment of the United States Court of Appeals For The Seventh Circuit entered on July 21, 1980. A petition for rehearing was denied on September 17, 1980.

[1] Edith M. Marschak, now known as Edith M. Ashley, is a trustee of a family trust that has held Westinghouse stock through all times relevant to the complaint. She sues in a derivative capacity.

OPINIONS

The opinions below, which have not been reported, are set out in the Appendices to this Petition. The opinion of the Court of Appeals is Appendix A; the opinion of the trial court, and its reconsideration, is Appendix B.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. Sec. 1254(1). The Court of Appeals rendered its opinion on July 21, 1980. A timely petition for rehearing was denied on September 17, 1980. The Court of Appeals had jurisdiction under 28 U.S.C. Sec. 1291 of an appeal from the District Court for The Northern District of Illinois, Eastern Division. Plaintiff claimed jurisdiction in the District Court on the basis of diversity of citizenship, 28 U.S.C. Section 1332.

STATUTES AND RULES INVOLVED

28 United States Code Section 1332:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> * * *
>
> "(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: * * *"

Federal Rules of Civil Procedure 23.1:

> "In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, * * * the complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority . . . and the reasons for his failure to obtain the action. . . ."

STATEMENT OF THE CASE

Nature of the Litigation

In this derivative shareholders action, the shareholder seeks recovery for the Westinghouse Electric Corporation against Kirkland & Ellis, its former attorneys, disqualified by the Court of Appeals in *Westinghouse* v. *Kerr-McGee, Gulf Oil Corp. and Getty Oil Co.,* 580 F.2d 1311 (7th Cir.), *cert. denied,* 439 U.S. 955 (1978). The Court found that Kirkland and Ellis had been guilty of a conflict of interest, having simultaneously represented defendants as well as Westinghouse as the plaintiff in a certain Uranium anti-trust case. The derivative action seeks recovery for Westinghouse of all fees which were charged by the law firm during the period of the conflict of interest, estimated to be approximately $2,500,000, 580 F.2d at 1313.

The Grounds for Realignment of the Corporation as a Party Plaintiff, and the Motion To Dismiss for Lack of Diversity of Citizenship Jurisdiction

The suit is brought under diversity of citizenship, 28 U.S.C. § 1332. The shareholder, Edith M. Marschak, (an Illinois citizen) brings suit as a nominal plaintiff, on behalf of Westinghouse, (a Pennsylvania corporation) against Kirkland and Ellis (an Illinois partnership). In response to a motion to dismiss for lack of complete diversity of citizenship, the shareholder requested the trial court to realign Westinghouse as a party plaintiff, and to disregard her citizenship, for the purpose of determining diversity of jurisdiction.

There are no allegations of wrongdoing on the part of Westinghouse management; Westinghouse did not oppose the action in its response to the shareholder's Rule 23.1 demand. However, the District Court below refused to order Westinghouse realigned as a party plaintiff, and granted West-

inghouse's motion to dismiss the complaint[2] for lack of complete diversity of jurisdiction.

The Rule 23.1 demand is set out in full in Appendix C. As noted above, it did not make allegations of wrongdoing against Westinghouse or its management.

The Corporation's answer to the demand is set out in full in Appendix D. It stated that Westinghouse, too, wanted to investigate the claim against Kirkland and Ellis, and that it had engaged Eckert, Seamans, a Pittsburgh law firm, to do so. The Eckert firm, however, was disqualified from undertaking the work because for over twenty years it had represented both Westinghouse and the Gulf Oil Corporation, the parties which had been represented by Kirkland and Ellis in the Uranium litigation. This was the reason, as contemplated by Rule 23.1, that the shareholder, therefore, upon receipt of the Westinghouse answer, proceeded to file this action. The answer to the demand was made part of the complaint (par. 4(a)) in an amendment, pursuant to F.R.C.P. 15. Defendants moved to dismiss, asserting lack of complete diversity of citizenship.

Thus on the complaint—the motion to dismiss was on procedural grounds, and not on the merits—the record showed inaction by the Corporation, but not antagonism. The Court of Appeals, however, in affirming the decision of the trial court, inferred antagonism from the mere fact that the Corporation did not file the action in response to the demand. The Court also took the demand itself as a sign of antagonism, even though the language of the demand did no more than follow the requirements of Rule 23.1.

In deciding whether to align Westinghouse as defendant or plaintiff, the District Court did not limit its inquiry to the complaint. The Court looked to subsequent proceedings, which

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[2] All pleadings, memoranda, briefs and arguments of Westinghouse were adopted by Kirkland and Ellis in the trial and reviewing court.

occurred months after the action was initiated, and perceived antagonism both from the shareholder's opposition to defendants' efforts to a stay of discovery, and the shareholder's motion to disqualify a Special Investigation Committee, which had been appointed by the Corporation, for lack of the requisite independence.

The Committee had not been appointed until after the suit was filed. The shareholder moved to disqualify the Committee for lack of the requisite independence as it was represented in the proceedings below by counsel for Westinghouse, and as Westinghouse's counsel participated in the Committee's onvestigation and deliberations. The Committee, however, in behalf of the Corporation, remained neutral throughout the proceedings.

The trial court did not rule on the motion, and the Committee did not make any recommendation to the Corporation on the action prior to dismissal of the complaint.

The Court of Appeals affirmed. In doing so, it concluded that the Corporation's failure to act was the same as a collision of issues between the shareholder and the Corporation, that even though the Corporation, through its Special Investigation Committee, was neutral, there was "antagonism" because of the Corporation's mere inaction.

The record stands that without allegations of wrongdoing against corporate management, the Corporation was not aligned as a party plaintiff, as though there would always be hostility between the shareholder and the Corporation in an ordinary derivative action where the shareholder brought suit after a corporation merely failed to act on a Rule 23.1 demand.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Ordinarily, a corporation will be aligned as a party plaintiff in a derivative action brought on its behalf as it is the real party in interest. However, if the shareholder charges malfeasance against corporate management, equity gives "special dispensation" to the corporation, and allows it to defend, rather than join in, such claims. The corporation and the shareholder are "antagonistic." *Koster* v. *Lumbermans Mutual Cas. Co.,* 330 U.S. 518, 522-523 (1947). Following this reasoning in *Smith* v. *Sperling,* 354 U.S. 91 (1957), and a companion case, *Swanson* v. *Traer,* 354 U.S. 114 (1957), this Court set down the procedure for making this determination.

In the present case, the decision below conflicts with this Court's procedural ruling. But of even broader significance, the Court below has applied this Court's definition of antagonism based on the charges of malfeasance against corporate officers to any derivative action where the corporation does not sue, as though its failure to do so is to be equated with antagonism. That aspect of the decision conflicts with the decision of the Second Circuit in *Lewis* v. *Odell,* 503 F.2d 445, 446-447 (2d Cir. 1974), discussed below.

I. FINDING ANTAGONISM BY MANAGEMENT MERELY FOR REFUSING TO FILE SUIT ON A SHAREHOLDER'S RULE 23.1 DEMAND MISAPPLIES THE PRESUMPTION OF ANTAGONISM BASED ON CHARGES OF WRONGDOING BY CORPORATE MANAGEMENT, WHICH DOES NOT APPLY IN AN ORDINARY DERIVATIVE ACTION FILED ON THE CORPORATION'S BEHALF.

The ruling below makes any derivative action antagonistic and prevents a corporation ever from being aligned as a party plaintiff where the corporation does not sue.

The Court's substantive rulings in *Koster, Smith* and *Swanson* follows a venerable line of cases in which the finding of antagonism was based on charges of malfeasance—fraud, breach of trust or illegality, *Central R. Co.* v. *Mills,* 113 U.S. 249, (1885), and *Doctor* v. *Harrington,* 196 U.S. 579, (1905). However, this Court has never ruled that mere refusal to sue in a case brought solely for the corporation's benefit is to be equated with a grounds for a finding of antagonism.

This question is of broad significance because if the decision below is allowed to stand, in any derivative shareholders action there will automatically be a finding of antagonism, even if the corporation does no more than fail or refuse to file in response to a typical Rule 23.1 demand, and if once the suit is filed the parties engage in ordinary procedural motions, none of which put the corporation on record as opposing the suit.[3]

The decision below conflicts with the ruling of the Second Circuit.

Lewis v. *Odell,* 503 F.2d 445, 446-447 (2d Cir. 1974), realigned the Corporation as a party plaintiff, and the citizenship of the plaintiff shareholder became irrelevant to the consideration of diversity jurisdiction.[4] The corporation was in bankruptcy, its trustees (who were then its management) would not be harmed by the suit and the company had been neutral to the action. The pleadings did not disclose the requisite antagonism of charges against management, and the

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[3] In this case the corporation did not oppose the suit. Its Special Investigation Committee, appointed after suit was filed to investigate, was by definition neutral. It did not make a recommendation to the corporation until after the trial court granted the motion to dismiss. There is nothing in the record as to whether the Corporation ever considered the recommendation.

[4] The shareholder is a nominal party, dissent of Justice Frankfurther, *Smith* v. *Sperling,* 354 U.S. at p. 97; *Ross* v. *Bernhard,* 396 U.S. 531, 538 (1970); *Koster, supra,* at p.522.

Court held there was no antagonism. The Second Circuit, relied on *Smith* v. *Sperling* and *Swanson* v. *Traer,* 503 F.2d at 447. Thus there is a direct conflict between the Circuits on this point which should be resolved by this Court.

II. THE DETERMINATION OF ALIGNMENT OF A CORPORATION AS PLAINTIFF OR DEFENDANT IN A DERIVATIVE ACTION IS TO BE MADE NOT ON THE BASIS OF PROCEEDINGS MONTHS AFTER THE SUIT IS FILED, BUT ON THE FACE COMPLAINT AND ANY RESPONSIVE PLEADING.

The ruling below resurrects uncertainty in the process of determining diversity jurisdiction in derivative actions.

The decision of the Court of Appeals conflicts with this Court's procedural ruling in *Smith* v. *Sperling* and *Swanson* v. *Traer.*[5] The Court of Appeals erroneously upheld a procedure

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[5] *Smith* v. *Sperling,* at p. 96:

"The bill and answer normally determine whether the management is antagonistic to the stockholder . . . "

The Court cited *Central R. Co.* v. *Mills,* 113 U.S. 249 (1885) and *Doctor* v. *Harrington,* 196 U.S. 579 (1905), and referred to *Hawes* v. *Oakland,* 104 U.S. 450 (1881), stating (354 U.S. at p. 96, fn. 3):

" . . . where in determining whether a proper case for a derivative action had been made out, the Court looked *only to the nature of the charges contained in the bill. Id.* 104 US pp. 461, 462." (Emphasis by the Court)

The procedure approved of below, looking to events subsequent to the filing of the action, conflicts with the decision of Chief Justice Marshall in *Mollan* v. *Torrance* (US) 9 Wheat 537, 539 (1824):

"It is quite clear, that the jurisdiction of the court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events."

The Court in *Smith* v. *Sperling,* 354 U.S. at p. 115, characterized the determination to be one "on the issues of wrongdoing" where there were such charges against corporate management.

going beyond an examination of the complaint and any responsive pleading. Instead the Court approved an inquiry which examined motions made months after the filing of those initial documents, and which would resurrect the uncertainty in such proceedings struck down by this Court in the *Smith* and *Swanson* decisions. The Court below erroneously relied on *Indianapolis* v. *Chase Nat. Bank,* 314 U.S. 63 (1941). In that case the interest of the corporation and trustees bring suit was common. Therefore, realignment of the corporation as plaintiff had been error, at p. 74. However, but for the common interest, it is clear that the realignment of the corporation would have stood; there was no claim of wrongdoing by corporate management. And although the Court of Appeals now speaks to the contrary (App. A. p7a), it has previously ruled in *Hoefferle Truck Sales* v. *Divco-Wayne,* 523 F.2d 543, 548 (1975) that: "It is fundamental that diversity is determined as of the time suit is commenced. *Julian* v. *Sarkas Tarzian, Inc.,* 352 F.2d 845, 846 (7th Cir. 1965)." That was correct.

CONCLUSION

For the reasons stated in this petition for a writ of certiorari, this Court should grant review, and order the decision below reversed, and the complaint reinstated.

Respectfully submitted,

MARSHALL PATNER
55 East Monroe Street
Suite 4005
Chicago, Illinois 60603
312/372-6475

Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

(Argued April 14, 1980)

July 21, 1980

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILLIAM J. JAMESON, Senior District Judge*

EDITH M. MARSCHAK, now known as EDITH M. ASHLEY, as Trustee, on behalf of herself, in such capacity, and on behalf of others similarly situated,

Plaintiff-Appellant,

No. 79-2464 *vs.*

KIRKLAND and ELLIS, a partnership, and WESTINGHOUSE ELECTRIC CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 79 C 1579

Honorable Frank J. McGarr, Judge Presiding.

ORDER

Appellant, Edith Marschak, brought this shareholder derivative action on behalf of herself, as trustee, and all other shareholders of Westinghouse Electric Corporation, (Westinghouse), [1] naming as defendants Westinghouse and Kirkland and Ellis, an Illinois partnership engaged in the practice of law. The district court dismissed the action for lack of subject matter jurisdiction because appellant failed to establish diversity of citizenship under 28 U.S.C. § 1332. We affirm.

* The Honorable William J. Jameson, United States Senior District Judge for the District of Montana, is sitting by designation.

[1] Appellant is trustee of a trust which owns stock in Westinghouse.

Background

By letter dated March 13, 1979, appellant's attorney wrote Westinghouse's Board of Directors demanding that the corporation institute an action "with immediate dispatch" against Kirkland and Ellis for the recovery of legal fees, costs and damages incurred by Westinghouse in *Westinghouse Electric Corp.* v. *Kerr-McGee Corp., Gulf Oil Corp. and Getty Oil Co.*,[2] by reason of the fact that the law firm had been found to be disqualified from representing Westinghouse because of a conflict of interest. The letter stated further that unless appellant was assured within 30 days that litigation would be undertaken by Westinghouse, appellant would institute a derivative action. By letter dated April 9, Westinghouse informed appellant's attorney that it had commenced an investigation through independent counsel and that the Board was currently reviewing the results of that investigation.

On April 19, 1979, appellant filed this action, alleging service of the demand letter, pursuant to Rule 23.1, F.R. Civ.P.[3]; that Westinghouse "responded but failed to take appropriate action"; that further demand would be futile; and that "plaintiffs have no remedy except as requested from this court". The complaint alleged that appellant was a "nominal party, the defendant corporation being the real party in interest", and that the district court "has jurisdiction under 28 U.S.C. 1332 as there is a diversity of citizenship between the Corporation which has its principal place of business in Pittsburg, Pennsylvania, and the defendant, an Illinois partnership entity'". There was no allegation with respect to appellant's citizenship.

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[2] This court's opinion is reported at 580 F.2d 1311 (7 Cir.) *cert. denied,* 439 U.S. 955 (1978).

[3] F.R.Civ.P. 23.1, "Derivative Actions by Shareholders", requires that, "The complaint shall . . . allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority. . . ."

On April 25, 1979, Westinghouse's Board of Directors established a Special Investigation Committee "to consider whether the prosecution of the claims alleged on behalf of the Corporation in the Derivative Actions[4] would be in the best interests of the Corporation and its shareholders". Westinghouse later moved to stay the proceedings in appellant's derivative action, including discovery requests by appellant, pending the outcome of the investigation. Appellant then moved to advance discovery and to stay the proceedings of the Special Investigation Committee. Appellant also amended her complaint, alleging that "to await action by the Corporation would have been futile" because certain members of the Special Investigation Committee also had a conflict of interest.

Westinghouse moved for dismissal on the grounds that (1) the complaint failed to aver facts sufficient to show diversity; and (2) on the basis of its belief that plaintiff was an Illinois citizen, diversity jurisdiction was lacking because the defendant, Kirkland and Ellis, was also an Illinois citizen. Appellant resisted the motion by arguing (1) that she was a nominal party, and therefore, her state of citizenship was irrelevant and (2) that Westinghouse should be realigned as a plaintiff. The district court rejected appellant's contentions and issued a memorandum opinion and order finding diversity of citizenship lacking and dismissing the complaint without prejudice. The court also refused to grant appellant's motion for leave to send a notice to other shareholders advising them of the dismissal and inviting them to substitute as plaintiffs. On appeal, appellant argues that the district court erred in both rulings.

Diversity of Citizenship

As the district court correctly stated in its memorandum opinion:

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[4] There was a second derivative action not related to this action.

> It is well settled that whenever federal jurisdiction is based on diversity of citizenship under 28 U.S.C. § 1332 (1976), there must be complete diversity. "That is, diversity jurisdiction does not exist unless *each* defendant is a citizen of a different State from *each* plaintiff." *Owen Equipment & Erection Co.* v. *Kroger,* 437 U.S. 365, 373 (1978) (emphasis in original). The burden of proving jurisdiction is, of course, on the party seeking to invoke the court's jurisdiction. Likewise, when diversity is challenged the burden remains on the party who has alleged diversity. *Village Fair Shopping Center Co.* v. *Sam Broadhead Trust,* 588 F.2d 431, 433 (5th Cir. 1979).

In determining whether diversity jurisdiction exists, the alignment of the parties as set forth in the pleadings is not, of course, conclusive. Rather, the court must "look beyond the pleadings and [should] arrange the parties according to their sides in the dispute". *Dawson* v. *Columbia Trust Co.,* 197 U.S. 178, 180 (1905); *Indianapolis* v. *Chase Nat'l Bank,* 314 U.S. 63, 69 (1941). The ultimate "interests" of the parties determine their sides in the lawsuit. In a stockholder's derivative suit, the ultimate interests of the stockholder and the corporation will generally be the same. Where, however, the management is definitely opposed to the institution of the litigation, it is "antagonistic" to the stockholders, and the parties will be aligned on opposite sides of the dispute. See, *e.g., Smith* v. *Sperling,* 354 U.S. 91 (1957); *Swanson* v. *Traer,* 354 U.S. 114 (1957); *Doctor* v. *Harrington*), 196 U.S. 579 (1905).

In its memorandum opinion, the district court noted that the complaint failed to "indicate plaintiff Marschak's state of citizenship [and failed to] indicate defendant Westinghouse's state of incorporation, which is one determinant of a corporation's citizenship". It concluded that, "Because jurisdiction is based only on diversity of citizenship, the complaint is defective for failing to allege the parties' citizenship." The court continued:

> The court cannot realign Westinghouse and ignore plaintiff Marschak's citizenship. Realigning the corporation in derivative suits is proper only when it is clear that the cause of action belongs to the corporation and the corporation is not antagonistic to the shareholder. To determine whether there is antagonism between the corporation and the shareholder, the court looks only at the pleadings. *Smith* v. *Sperling,* 354 U.S. 91 (1957).

The district court concluded that it was clear from the pleadings that appellant's "view of any action differs from the Board of Directors' view". Sufficient antagonism to preclude realignment was shown (1) by plaintiff's amended complaint which alleged the Board's action against Kirkland and Ellis was inadequate; and (2) by plaintiff's motion to disqualify the Special Investigation Committee, which was appointed to determine whether Westinghouse should assert a claim against Kirkland and Ellis. The court concluded that since Westinghouse could not be realigned, plaintiff could not be considered a nominal plaintiff and her citizenship was relevant. Plaintiff did not refute Westinghouse's assertion that she was an Illinois resident.[5] Therefore, "Because defendant Kirkland also had Illinois citizenship, complete diversity is lacking."

Appellant contends the district court erred "in finding antagonism between the shareholder and the corporation, either on her demand, as of the time of the filing of the complaint as amended, or subsequently, when she challenged the Special Investigation Committee for lack of independence". She argues (1) that under *Smith* v. *Sperling, supra,* antagonism "against the demands of the shareholder is to be found only if there is some clear and unequivocal indication by the corporation that it opposes the shareholder's action"; (2) that Westinghouse's answer to her demand that it too was looking

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[5] The court noted that, "While residency is not synonymous with citizenship, proof of residency is prima facie evidence of citizenship absent any indication to the contrary," citing C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure, § 3611 at 711-12.

into the matter and its subsequent appointment of a Special Investigation Committee shows there was no antagonism; and (3) that the district court was prohibited from considering her motion to disqualify the Special Investigation Committee since antagonism is to be determined "at the time the complaint is filed [or] . . . amended". We disagree.

While the record must show that the corporate management opposes the institution of litigation to make it "antagonistic", see *Swanson* v. *Traer, supra,* this opposition may be shown by the management's failure to act for any reason. As the Court stated in *Smith* v. *Sperling, supra,*

> The management may refuse or fail to act for any number of reasons. Fraud may be one; the reluctance to take action against a close business associate may be another; honest belief in the wisdom of the course of action which the management has approved may be still another; and so on.

Id. at 96.

The Court continued:

> The attitude of the directors need not be sinister. It may be sincere. Whenever the management refuses to take action to undo a business transaction or whenever, as in this case, it so solidly approves it that any demand to rescind would be futile, antagonism is evident. The cause of action, to be sure, is that of the corporation. But the corporation has become through its managers hostile and antagonistic to the enforcement of the claim.

Id. at 97 (quoting from *Delaware & H. Co.* v. *Albany & S. R. Co.,* 213 U.S. 435).

We agree with the district court that the response of Westinghouse's Board of Directors to appellant's suit showed sufficient antagonism to preclude realignment. It appears from the face of the complaint that (1) the corporation "failed to take appropriate action on her demand" to bring suit against Kirkland and Ellis, (2) further demand would be "futile" and

"unavailing"; (3) "*independent action is necessary*" because Westinghouse continued to retain Kirkland and Ellis after the conflict of interest was exposed and Westinghouse has a record of "conflicts of interest with its counsel" (emphasis added); (4) the counsel Westinghouse engaged to look into the questions also have a conflict of interest; and (5) because of these circumstances, the stockholders' "*only recourse* was to seek relief from this court" (emphasis added). In light of these allegations and the fact that Westinghouse is resisting appellant's action, it would be anomalous to hold that the Board of Directors is not "hostile and antagonistic to the claim", (citing *Smith* v. *Sperling,* 354 U.S. 91, at 97 (1957)).

Moreover, in examining the nature of the controversy to resolve the antagonism issue it was proper for the district court to consider appellant's motion to disqualify the Special Investigation Committee and other motions and papers filed throughout the proceedings. Although the requirement of diversity of citizenship is ordinarily determined by considering the circumstances as they existed at the time the action commenced, *e.g., Hoefferle Truck Sales, Inc.* v. *Divco-Wayne Corp.,* 523 F.2d 543 (7 Cir. 1975), "in determining whether realignment of parties is required, the position taken by a party during the litigation may be considered in determining how he should originally have been aligned." Wright, Law of Federal Courts § 28, p. 93 (1970); Accord, *Green* v. *Green,* 218 F.2d 130, 144 (7 Cir.) *cert. denied,* 349 U.S. 917 (1954). Professor Wright states further: "Although questions of alignment are determined initially from the pleadings, the subsequent course of the litigation may reveal more clearly the position of the various parties and cast light on how they should have been originally aligned." § 30, p. 97.

Westinghouse moved to stay proceedings in appellant's action, including discovery requests. In turn appellant moved to advance discovery and to disqualify the Special Investigation

Committee. These proceedings "reveal more clearly" that Westinghouse was properly aligned as a defendant when appellant commenced her action.[6]

Leave to Give Notice to Other Shareholders

Finally, appellant contends that if she failed to establish diversity jurisdiction, "the trial court should have considered the shareholder's request for leave to give notice to the non-Illinois shareholders of Westinghouse . . . " Rule 23.1 provides that a derivative action by a shareholder "shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs." The purpose of this rule was stated in 7A Wright & Miller, Federal Practice and Procedure: Civil § 1839, pp. 427-428:

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[6] Appellant also argues that *Navarro Savings Ass'n* v. *Lee*, ____ U.S. ____, 48 L.W. 4551, decided May 19, 1980, after oral argument in this case, and affirming *Lee* v. *Navarro*, 597 F.2d 421 (5 Cir. 1979), is controlling on the "central issue" that the citizenship of an entity rather than that of its shareholders determines jurisdiction in actions based on diversity. In that case the Court held that trustees of a business trust properly invoked diversity jurisdiction on the basis of their own citizenship, regardless of the citizenship of the trust beneficiaries. In holding that the trustees were "real parties to the controversy", the Court noted that the declaration of trust gave the trustees exclusive authority over the property "free from any power or control of the shareholders, to the same extent as if the Trustees were the sole owners . . ." Under these circumstances the citizenship of beneficiaries was not relevant.

We agree with the district court that *Navarro* is inapposite. *Navarro* was an action by the trustees against a third party. It did not involve a dispute or any question of antagonism between the trustees and shareholders. In this case a shareholder is seeking in a derivative action against the corporation to enforce what she believes to be the corporation's right. As the district court found, there is "antagonism" between the shareholder and the corporation. The citizenship of the shareholder under these circumstnaces becomes relevant.

> The notice and court approval of a dismissal or compromise of a shareholder derivative suit is intended to discourage the private settlement of a derivative claim under which a shareholder-plaintiff and his attorney personally profit to the exclusion of the corporation and the other shareholders. Dismissals, as well as settlements, are included in Rule 23.1 to prevent an agreed upon dismissal from being a cloak for a private settlement.
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> . . .
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> . . . On the other hand, it is clear that when the dismissal . . . results from a jurisdictional defect . . . the notice requirement of the rule is not applicable. In [this] situation there is no reason to fear collusion inasmuch as the shareholder-plaintiff's action is being terminated involuntarily.

Id. p. 436.[7]

The notice requirement of Rule 23.1 is not applicable since the dismissal here was involuntary and on jurisdictional grounds.

AFFIRMED.

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[7] See also 3B Moore's Federal Practice, para. 23.124[2]. pp. 130-131; *Marcus* v. *Textile Banking Co.,* 38 F.R.D. 185 (S.D. N.Y. 1965).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

EDITH M. MARSCHAK, now known as Edith M. Ashley, as Trustee, on behalf of herself, in such capacity, and on behalf of all others similarly situated,

Plaintiff,

v.

KIRKLAND AND ELLIS, a partnership, and WESTINGHOUSE ELECTRIC CORPORATION,

Defendants.

No. 79 C 1579

MEMORANDUM OPINION AND ORDER

This is a shareholder derivative action brought by Edith Marschak ("plaintiff Marschak"). The complaint alleges that plaintiff Marschak is trustee of a trust which owns stock in Westinghouse Electric Corporation ("Westinghouse"). Plaintiff Marschak has brought the action on behalf of herself, as trustee, and as a representative of all other Westinghouse shareholders. Named as defendants are Westinghouse and Kirkland & Ellis, an Illinois partnership engaged in the practice of law ("Kirkland"). The complaint bases federal jurisdiction on diversity of citizenship under 28 U.S.C. § 1332 (1976). Defendants Westinghouse and Kirkland have moved for dismissal for want of subject matter jurisdiction. As will be indicated herein, complete diversity of citizenship is lacking. Hence, the court lacks subject matter jurisdiction. Defendants' motions, therefore, are granted.

It is well settled that whenever federal jurisdiction is based on diversity of citizenship under 28 U.S.C. § 1332 (1976), there must be complete diversity. "That is, diversity jurisdiction does

not exist unless *each* defendant is a citizen of a different State from *each* plaintiff." *Owen Equipment & Erection Co.* v. *Kroger,* 437 U.S. 365, 373 (1978) (emphasis in original). The burden of proving jurisdiction is, of course, on the party seeking to invoke the court's jurisdiction. Likewise, when diversity is challenged, the burden remains on the party who has alleged diversity. *Village Fair Shopping Center Co.* v. *Sam Broadhead Trust,* 588 F.2d 431, 433 (5th Cir. 1979).

In this action, the complaint does not indicate plaintiff Marschak's state of citizenship. Nor does it indicate defendant Westinghouse's state of incorporation, which is one determinant of a corporation's citizenship. *See* 28 U.S.C. § 1332(c) (1976). It does allege, however, that defendant Kirkland, as an Illinois partnership, is an Illinois citizen and that because defendant Westinghouse's principal place of business is Pennsylvania, it is a Pennsylvania citizen. Further, the complaint states that Westinghouse is the real party in interest and plaintiff Marschak is only a nominal party.

In their motions to dismiss, defendants assert that 1) the complaint is defective for failure to aver facts that clearly show the basis for diversity jurisdiction and 2) because plaintiff Marschak is an Illinois resident, she may be an Illinois citizen, in which case, her citizenship would be the same as that of defendant Kirkland. Thus, diversity would be lacking.

Because jurisdiction is based only on diversity of citizenship, the complaint is defective for failing to allege the parties' citizenship. *See* Rule 8, Fed.R.Civ.P.; *see also Schultz* v. *Cally,* 528 F.2d 470, 473 (3d Cir. 1975). Although these defects might ordinarily be cured by amendment, plaintiff Marschak has had ample opportunity to allege facts showing diversity, which she has not done. Thus, leave to amend will not be granted.

Rather than indicate her state of citizenship, plaintiff Marschak contends that it is irrelevant because Westinghouse is the real party in interest and should be realigned as plaintiff. If

plaintiff Marschak were a nominal party, whose citizenship could be ignored, and Westinghouse were realigned as plaintiff, there would be diversity between Westinghouse, a Pennsylvania citizen, and Kirkland, an Illinois partnership. (Although the complaint does not allege Westinghouse's state of incorporation, later pleadings indicate that it is Pennsylvania. Hence, its state of incorporation, as well as its principal place of business, indicates that Westinghouse is a Pennsylvania citizen.)

The court cannot realign Westinghouse and ignore plaintiff Marschak' citizenship. Realigning the corporation in derivative suits is proper only when it is clear that the cause of action belongs to the corporation and the corporation is not antagonistic to the shareholder. To determine whether there is antagonism between the corporation and the shareholder, the court looks only at the pleadings. *Smith* v. *Sperling,* 354 U.S. 91 (1957).

In this case, the complaint alleges that, pursuant to Rule 23.1, Fed.R.Civ.P., plaintiff Marschak made a demand (that Westinghouse seek recovery from Kirkland) on the Westinghouse Board of Directors. Complaint ¶3 at 2. An amendment to the complaint sets forth in considerable detail, the circumstances that "made it apparent that to await action by the Corporation would have been futile and unavailing." Amendment to the Complaint, ¶4 (filed August 15, 1979).

The corporation's refusal to take action has been held sufficient to show antagonism. *Smith* v. *Sperling,* 354 U.S. 91 (1957); *Rogers* v. *Valentine,* 426 F.2d 1361, 1363 (2d Cir. 1970). Although the complaint here does not specifically allege that the corporation has refused to take action, it does allege essentially that the action taken by the Board of Directors (retaining attorneys) was inadequate. *See* Amendment to the Complaint ¶4 (filed Aug. 15, 1979). Further, plaintiff Marschak has moved to disqualify the Special Investigation Committee, which was appointed by the Board of Directors to

determine whether Westinghouse should assert a claim against Kirkland. It is clear from these pleadings that plaintiff Marschak's view of any action differs from the Board of Directors' view. Hence, there is a sufficient showing of antagonism to preclude realignment. Westinghouse, therefore, must remain a defendant.

Because there is antagonism between defendant Westinghouse and plaintiff Marschak, it is clear that she is more than just a nominal party. Her citizenship, therefore, is relevant. Defendants assert, and plaintiff Marschak has not refuted, that she is an Illinois resident. While residency is not synonymous with citizenship, proof of residency is prima facie evidence of citizenship absent any indication to the contrary. C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure* § 3611 at 711-12 (citing *Kelleam* v. *Maryland Casualty Co.,* 112 F.2d 940, 943 (10th Cir. 1940), *rev'd. on other grounds,* 312 U.S. 377 (1941); *Howard* v. *Barr,* 114 F.Supp. 48, 50 (W.D. Ky. 1953). As plaintiff Marschak has neither stated her citizenship, nor denied that she is an Illinois resident, the court must conclude that she is an Illinois citizen. Because defendant Kirkland also has Illinois citizenship, complete diversity is lacking. Accordingly, defendants' motions to dismiss are granted. The complaint is dismissed without prejudice.

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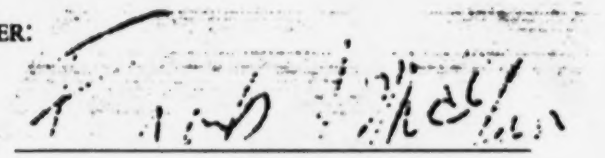

United States District Judge

DATED: December 7, 1979

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

EDITH M. MARSCHAK, now known as Edith M. Ashley, as Trustee, on behalf of herself, in such capacity, and on behalf of all others similarly situated,

Plaintiff,

v.

KIRKLAND AND ELLIS, a partnership, and WESTINGHOUSE ELECTRIC CORPORATION,

Defendants.

No. 79 C 1579

MEMORANDUM OPINION AND ORDER

On November 27, 1979, this court announced its decision on defendants' motions to dismiss. Finding that diversity of citizenship was lacking, the court dismissed the complaint for want of subject matter jurisdiction. Before the Memorandum Opinion and Order was issued, plaintiff Marschak filed a motion seeking reconsideration and a stay of the Westinghouse Special Investigation Committee's report, or, alternatively, leave to send a notice to other shareholders advising them of the dismissal and inviting them to substitute as plaintiffs. The court has reconsidered the ruling on the motions to dismiss and finds that, because diversity is still lacking, the court does not have jurisdiction. Accordingly, plaintiff's instant motions are denied. The basis for this ruling follows.

Plaintiff's motion to reconsider is based on the Fifth Circuit's ruling in *Lee* v. *Navarro Savings Association,* 597 F.2d 421 (5th Cir. 1979), *cert. granted,* 48 U.S.L.W. 3349 (U.S. Nov. 26, 1979) (No. 79-465). In that case, the trustees of a

business trust brought a breach of contract action, on behalf of the trust, against a savings association. The Court of Appeals for the Fifth Circuit held that because the trustees were vested with the power to sue and be sued on behalf of the trust and were in actual control of the trust, they were the real parties in interest whose citizenship was considered for diversity purposes. 597 F.2d at 425. In holding that the trust beneficiaries' citizenship was irrelevant, the court relied on the Declaration of Trust which gave broad powers to the trustees and strictly limited the beneficiaries' rights. *Id.* at 424-25. Thus, the court found that the trustees possessed "the sole right to bring [the] action." *Id.* at 425.

The instant case differs from *Navarro* in that Westinghouse is not a business trust, but a corporation. This is a derivative action, which by its unique nature indicates that the corporation is not "exclusively entitled to enforce [its] rights." *Id.* at 424. Unlike the beneficiary of the business trust in *Navarro,* the shareholder in a derivative action can enforce what he believes to be the corporation's right. *Navarro,* therefore, is not controlling here and this court's earlier decision dismissing the complaint remains in effect.

Because the court does not have jurisdiction, it cannot stay the issuance of the Special Investigation Committee's report or grant leave to send a notice to the other shareholders. Accordingly, plaintiff's motion is denied *in toto.*

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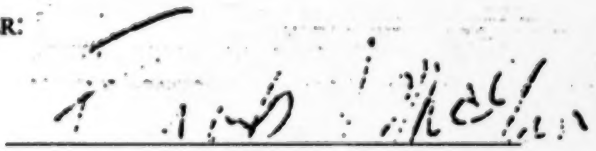

United States District Judge

DATED: December 7, 1979

APPENDIX C

LAW OFFICES
MARSHALL PATNER
10 SOUTH LA SALLE STREET
CHICAGO, ILLINOIS 60603
(312) 236-7091

March 13, 1979

Mr. Robert E. Kirby
Chairman of the Board of Directors
Westinghouse Electric Corporation
Gateway Center Westinghouse Building
Pittsburgh, Pennsylvania 15222

Dear Mr. Kirby:

I am writing to you as attorney for a shareholder of the Westinghouse Electric Corporation. I am writing to make a demand on the Board of Directors of the Corporation, in compliance with Rule 23.1 of the Federal Rules of Civil Procedure, to file suit in the name of the Corporation against the law firm of Kirkland & Ellis. The demand is made on you to seek recovery of all legal fees, costs and incidental expenses, and for damages, actual, punitive and exemplary and for fees, for the amounts paid to the law firm for the litigation known as *Westinghouse Electric Corporation* v. *Kerr-Mc Gee Corporation, Gulf Oil Corporation and Getty Oil Company.* This case was brought in the Northern District of Illinois, Eastern Division, and on appeal the United States Court of Appeals for the Seventh Circuit decided that the law firm was disqualified from representing the corporation in the litigation because of a conflict of interest. This demand includes a request to seek recovery of all amounts paid to the firm for its unsuccessful defense of its position denying the conflict.

It is imperative that you instigate this litigation against Kirkland & Ellis with immediate dispatch in order to protect the interest of the Corporation, and of the stockholders similarly situated to my client, and to prevent any further harmful consequences because of the firm's action. I therefore ask you for written assurance within thirty days of the date of this letter that such litigation will be undertaken in the name of the corporation; otherwise, upon failure of the Board of Directors to do so, my client, who was a shareholder during all times relevant to this demand, has instructed me to promptly institute a derivative action. I am sending copies of this demand letter individually to each member of the Board of Directors, care of the Corporation.

I will be pleased to meet with independent counsel, if I am first given a full opportunity to examine your memoranda on the subject, with a view toward eliminating the directors as potential defendants. I look forward to your reply.

Yours very truly,

/s/ Marshall Patner

Marshall Patner

APPENDIX D

Westinghouse
Electric Corporation

Robert F Pugliese
Vice President
and General Counsel, Secretary

Westinghouse Building
Gateway Center
Pittsburgh Pennsylvania 15222

April 9, 1979

Marshall Patner, Esquire
10 South LaSalle Street
Chicago, Illinois

Re: Westinghouse Electric Corporation v.
Kerr-McGee Corporation, et al.

Dear Mr. Patner:

I have been asked to respond to your recent letters dated March 13, 1979 in connection with the above matter.

Some months prior to receipt of your letter, Westinghouse Electric Corporation ("Westinghouse") retained the Pittsburgh law firm of Eckert, Seamans, Cherin & Mellott as independent counsel to conduct a review of the matter of the disqualification of the law firm of Kirkland & Ellis as counsel for Westinghouse in its anti-trust suit against twenty-nine uranium producers and to advise Westinghouse with respect to the rights which it might have as a result of that disqualification. We have had several discussions with members of the Eckert firm with respect to this matter and have received and reviewed with the Board of Directors the tentative conclusions of that firm.

Please be assured that once the Eckert firm has completed its review and Westinghouse has had a reasonable opportunity to consider the recommendations, we shall communicate with you.

In conclusion, I would like to point out, however, that Kirkland & Ellis, without admitting any liability to do so, has agreed that Westinghouse shall not be required to pay the costs and fees associated with the defense by Kirkland & Ellis in the disqualification proceedings.

Sincerely,

R. J. Bruglieri

No. 80-1007

JAN 16 1981

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EDITH M. MARSCHAK, now known as EDITH M. ASHLEY, as Trustee, on behalf of herself, in such capacity, and on behalf of all others similarly situated,

Petitioner,

v.

KIRKLAND & ELLIS, a partnership, and WESTINGHOUSE ELECTRIC CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT WESTINGHOUSE ELECTRIC CORPORATION IN OPPOSITION

JOHN LOGAN O'DONNELL
299 Park Avenue
New York, New York 10171
(212) 688-0400
Counsel for Respondent
Westinghouse Electric
Corporation

PETER ARON
ANDREW J. KYREAKAKIS
OLWINE, CONNELLY, CHASE,
O'DONNELL & WEYHER
299 Park Avenue
New York, New York 10171
Of Counsel

Questions Presented

I. In Affirming The District Court's Ruling That The Plaintiff Shareholder And Defendant Westinghouse Electric Corporation ("Westinghouse") Were Antagonistic, Did Not The Court Of Appeals Properly Apply This Court's Standard That Antagonism Is To Be Determined By The Pleadings And Nature of The Controversy?

   A. Did Not The Court Of Appeals Properly Determine That Such Antagonism Appeared From The Complaint?

   B. Did Not The Court Of Appeals Properly Determine That The Consistently Opposing Positions Of Plaintiff And Westinghouse Throughout The Litigation Confirmed That Antagonism?

II. Irrespective Of Westinghouse's Alignment, Is Not Diversity Jurisdiction Still Lacking Because The Plaintiff Shareholder And Defendant Kirkland & Ellis Are Illinois Citizens?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Counterstatement of the Case	1
Reasons for Denying the Writ	3
Summary of Argument	3
Argument	
Point I—The Court of Appeals Properly Found Antagonism Between Plaintiff and Westinghouse on the Basis of the Pleadings and Nature of the Controversy	3
A. Antagonism is Apparent from Petitioner's Complaint	3
B. The Nature Of The Controversy Between Petitioner And Westinghouse Confirms The Antagonism Apparent From The Complaint	5
Point II—Irrespective of Westinghouse's Alignment, Diversity Jurisdiction is Lacking Because Petitioner and Defendant Kirkland & Ellis are Illinois Citizens	6
Conclusion	7

TABLE OF AUTHORITIES

Cases

	Page
Dawson v. *Columbia Avenue Saving Fund, Safe Deposit Title & Trust Company*, 197 U.S. 178 (1905)	5
Doctor v. *Harrington*, 196 U.S. 579 (1905)	4
Indianapolis v. *Chase National Bank*, 314 U.S. 63 (1941)	5
Lewis v. *Odell*, 503 F.2d 445 (2d Cir. 1974)	4, 5, 6-7
Smith v. *Sperling*, 354 U.S. 91 (1957)	4, 5
Swanson v. *Traer*, 354 U.S. 114 (1957)	4
Tucker v. *National Linen Service Corp.*, 92 F. Supp. 502 (N.D. Ga. 1950), *aff'd*, 188 F.2d 265 (5th Cir.), *cert. denied*, 342 U.S. 828 (1951)	6

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Counterstatement of the Case

Petitioner Marschak, an Illinois citizen, is a trustee of Westinghouse stock who in March 1979 demanded that Westinghouse sue the Illinois law firm of Kirkland & Ellis "with immediate dispatch," insisting on "written assurance within thirty days" that the suit would be brought. (Petition for Certiorari, Appendix C) Westinghouse responded that a review of the matter had been undertaken and that it would communicate with Petitioner's counsel following completion of the review. (Petition for Certiorari, Appendix D)

About a month later, Petitioner brought this shareholders' derivative action for recovery of certain fees allegedly paid by Westinghouse to Kirkland & Ellis. Her complaint alleged, among other things, that Westinghouse "failed to take appropriate action" on her demand; that

further demand would be "futile" and "unavailing"; that "independent action is necessary" because Westinghouse improperly continued to retain Kirkland & Ellis; that Westinghouse had a record of "conflicts of interests with its counsel"; that the law firm which Westinghouse had engaged to review the matter also had a conflict of interest; and that the shareholders' "only recourse was to seek relief from this Court." (Complaint, ¶ 4, Amended Complaint, ¶ 4, Appendix to the Court of Appeals, Tabs 1 and 2)

Throughout the litigation Petitioner and Westinghouse have been at odds. Following commencement of the action, Westinghouse moved to dismiss. It also moved to stay the action pending completion of the review of the matter undertaken by a special committee of its board of directors. In turn, Petitioner strove to undermine the committee's work by moving to advance discovery and to stay the committee's proceedings, by moving for a voir dire examination of the committee proceedings, by moving to disqualify the committee, by moving to stay or enjoin the report of the committee, and by moving (before the Court of Appeals) to recall the committee's report (which concluded that the maintenance of this action was not in the corporation's best interest*)—all of which Westinghouse vigorously opposed. (Appendix to the Court of Appeals, Tabs 6, 7, 9, Supplemental Appendix to the Court of Appeals, pp. 22a, 28a, 47a, 59a, 66a, 72a) And Petitioner's appeals have met equal resistance.

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*Petitioner incorrectly states that the committee remained "neutral" throughout the proceedings. (Petition for Certiorari, p. 6) In fact, the committee had reached its determination that this action was contrary to the best interest of Westinghouse by November 29, 1979, while the District Court issued its memorandum opinions granting the motion to dismiss and denying Petitioner's motion for reconsideration on December 7, 1979. Petitioner also incorrectly suggests that the committee's authority was limited to the issuance of a "recommendation" to the corporation (Petition for Certiorari, p. 6), when in fact the committee was empowered to act with full authority of the board. (Supplemental Appendix to the Court of Appeals, pp. 9a-10a, 65a; Petition for Certiorari, Appendix B)

Reasons for Denying the Writ

Summary of Argument

Corporate management's opposition to a derivative suit, as determined by the pleadings and nature of the controversy, constitutes antagonism which requires the suing shareholder and corporation to be aligned as adversaries. Petitioner's numerous complaint allegations attacking the decisions and conduct of Westinghouse management, including its failure to act as she had demanded, clearly reflect such antagonism. That antagonism is confirmed by those parties' disputes throughout the litigation, including their respective opposing positions on motions made both prior to and following the service and filing of Petitioner's amended complaint. Since Westinghouse therefore may not properly be aligned as plaintiff, diversity jurisdiction is lacking because both Petitioner, the plaintiff below, and respondent Kirkland & Ellis, a defendant below, are Illinois citizens.

Indeed, even if Westinghouse were realigned as a plaintiff, diversity jurisdiction still would be lacking because Petitioner, as an active litigant, would remain a party whose citizenship would preclude diversity jurisdiction just the same.

Argument

POINT I

THE COURT OF APPEALS PROPERLY FOUND ANTAGONISM BETWEEN PLAINTIFF AND WESTINGHOUSE ON THE BASIS OF THE PLEADINGS AND NATURE OF THE CONTROVERSY.

A. Antagonism is Apparent From Petitioner's Complaint.

This Court has consistently reaffirmed that corporate management's opposition to the commencement and maintenance of a derivative action constitutes antagonism which requires the plaintiff shareholder and the corporation to be

aligned as adversaries. *Smith* v. *Sperling,* 354 U.S. 91, 95, 97 (1957); *Swanson* v. *Traer,* 354 U.S. 114, 116 (1957); *Doctor* v. *Harrington,* 196 U.S. 579, 587-88 (1905).

Petitioner argues that the Court of Appeals did not adhere to this Court's standard because it found antagonism even though:

> a. In her complaint she did not charge Westinghouse management with malfeasance; and
>
> b. Westinghouse "merely failed to act" in response to her demand. (Petition for Certiorari, p. 6)

However, allegations of management malfeasance are not a prerequisite to a finding of antagonism, which exists "*whenever* the management is aligned against the stockholder and defends a course of conduct which he attacks." *Smith* v. *Sperling, supra,* 354 U.S. at 95 (emphasis added). The motivation for management's opposition—"for good reasons or for bad"—is not relevant.* *Swanson* v. *Traer,* 354 U.S. at 116.

Furthermore, contrary to Petitioner's argument, Westinghouse's failure to take the action she demanded and her other complaint allegations attacking Westinghouse's decisions and conduct do indeed reflect antagonism:

> "Whenever the management refuses to take action to undo a business transaction or whenever, as in this case, it so solidly approves it that any demand to rescind would be futile, antagonism is evident." *Smith* v. *Sperling, supra,* 354 U.S. at 97.

The Court of Appeals' application of this standard is not in conflict with the decision of the Second Circuit in *Lewis* v. *Odell,* 503 F.2d 445 (2d Cir. 1974), as Petitioner incorrectly urges. Unlike here, the *Lewis* plaintiff did not allege that he

*In fact, as indicated, in this case a special committee of the board of directors undertook an investigation and determined that the maintenance of this action was contrary to Westinghouse's best interest.

had made any demand, much less that the corporation had failed to take the action demanded. Furthermore, in looking beyond the pleadings, the Second Circuit found that none of the trustees of the bankrupt corporation on whose behalf suit was brought "has any reason to oppose the suit"; indeed, the trustees even reserved the right to take control of the action. 503 F.2d. at 447. This starkly contrasts with Westinghouse management's unyielding opposition to this suit at every turn.

B. The Nature Of The Controversy Between Petitioner And Westinghouse Confirms The Antagonism Apparent From The Complaint.

Petitioner also argues that the Court of Appeals improperly considered "proceedings months after the suit is filed" in determining whether antagonism exists, which assertedly conflicts with this Court's admonition that antagonism may be determined only from the pleadings. (Petition for Certiorari, p. 9)

But this Court has oft reminded that the existence of antagonism "is a practical not a mechanical determination and is resolved by the pleadings *and* the nature of the dispute." *Smith* v. *Sperling,* 354 U.S. at 97 (emphasis added). It has directed the courts to " 'look beyond the pleadings and arrange the parties according to their sides in the dispute.' " *Indianapolis* v. *Chase National Bank,* 314 U.S. 63, 69 (1941); *Dawson* v. *Columbia Avenue Saving Fund, Safe Deposit, Title & Trust Company,* 197 U.S. 178, 180 (1905).

In this case, the Court of Appeals did not have to go beyond Petitioner's complaint to find antagonism. Indeed, even under Petitioner's argument that the Court may consider only circumstances existing as of when the pleadings are filed (Petition for Certiorari, p. 9), the antagonism between Petitioner and Westinghouse by the time Petitioner filed her amended complaint was manifest: Petitioner had served discovery requests which Westinghouse opposed by

motion to stay the proceedings, prompting Petitioner in turn to move to advance discovery or to stay the issuance of the special committee's report.

Thus the Court of Appeals' consideration of the heated battles between Petitioner and Westinghouse throughout the litigation only confirmed the antagonism evident from the pleadings.

POINT II

IRRESPECTIVE OF WESTINGHOUSE'S ALIGNMENT, DIVERSITY JURISDICTION IS LACKING BECAUSE PETITIONER AND DEFENDANT KIRKLAND & ELLIS ARE ILLINOIS CITIZENS.

Petitioner argues that if Westinghouse were realigned as plaintiff, her Illinois citizenship would be disregarded, thus creating diversity between Westinghouse (a Pennsylvania citizen) and Kirkland & Ellis (an Illinois citizen). (Petition for Certiorari, p. 4) On point to the contrary is *Tucker* v. *National Linen Service Corp.*, 92 F. Supp. 502, 505-06 (N.D. Ga. 1950), *aff'd*, 188 F.2d 265 (5th Cir), *cert. denied*, 342 U.S. 828 (1951). In that shareholders' derivative action, the District Court rejected the same argument made by Petitioner, explaining that

> "realignment here would not save jurisdiction, for even if [the corporation] is treated as a plaintiff instead of a defendant as the complaint makes it, the stockholder plaintiff, Mrs. Tucker, is still a party plaintiff and is still a citizen of the same State as numerous defendants." *Id.* at 505-06.

While Petitioner argues that in *Lewis* v. *Odell*, *supra*, the citizenship of the plaintiff shareholder "became irrelevant to the consideration of diversity jurisdiction" (Petition for Certiorari, p. 8), the decision is devoid of any such suggestion. The Second Circuit rather implies the opposite, by noting plaintiff's citizenship and in characterizing the realigned corporation as "*a*" (not *the only*) plaintiff. 503 F.2d

at 447. Since the *Lewis* Court found diversity lacking without regard to the plaintiff shareholder's citizenship, it made no difference whether such citizenship were considered.

As the *Tucker* Court ruled, realignment of the corporation as plaintiff makes the suing shareholder no less an active litigant, seeking to prosecute his claim and pursuing the desired result in such manner as he chooses. Realignment of Westinghouse would not make Petitioner disappear, and the Illinois citizenship of both Petitioner and Kirkland & Ellis would preclude diversity jurisdiction.

Conclusion

The Court of Appeals properly applied this Court's standard for determining antagonism. Its decision is not in conflict with that of any other circuit court. Based on the pleadings and facts before it, and affecting only parties to this litigation, the Court of Appeals' decision presents no question worthy of review by this Court. Therefore, the Petition for a Writ of Certiorari should be denied.

January 16, 1981

Respectfully submitted,

JOHN LOGAN O'DONNELL
299 Park Avenue
New York, New York 10171
(212) 688-0400
Counsel for Respondent
Westinghouse Electric
Corporation

PETER ARON
ANDREW J. KYREAKAKIS
OLWINE, CONNELLY, CHASE,
O'DONNELL & WEYHER
299 Park Avenue
New York, New York 10171

Of Counsel

No. 80-1007

IN THE

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MARSHALL PATNER
55 East Monroe Street
Suite 4005
Chicago, Illinois 60603
312/372-6475

Attorney for Petitioner

Pandick Press Midwest, Inc., Chicago • 454-7600

IN THE

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The Reply, in Support of the Petition for a Writ of Certiorari, is limited to providing essential omissions from the cases, and to correct factual misstatement, in the Westinghouse[1] Brief in Opposition.

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[1] As it did at each stage of the proceedings below, Kirkland and Ellis has adopted Westinghouse's Brief in this Court, Motion dated January 16, 1981.

I.A.

IN EACH CASE WESTINGHOUSE CITES, ANTAGONISM WAS FOUND ONLY WHERE THE SHAREHOLDER CHARGED MANAGEMENT WITH WRONGDOING

Westinghouse (Br. in Opp'n., Pt. 1A, p. 4) quotes general language from *Smith* v. *Sperling*, but fails to state that in *Smith*,[2] in *Swanson* v. *Traer*,[3] and in *Doctor* v. *Harrington*, 196 U.S. 579, 587-588 (1905), this Court found antagonism only where the shareholder charged corporate management with wrongdoing.

The rule under these cases is that only if wrongdoing is charged against management, then the corporation is not aligned as a party plaintiff.

I.B

ONLY WHERE THERE IS COLLUSION OR OTHER ARRANGEMENTS IN ALIGNMENT, DOES THE COURT GO BEYOND THE PLEADINGS

Westinghouse also fails to state that only where there is collusion in alignment of the parties, *Dawson* v. *Colombia Ave. Saving Fund*, 197 U.S. 178, 181-182 (1905) characterized by the Court as "pretense" and "device," or where the parties themselves have arranged their alignment for their own convenience, *Indianapolis* v. *Chase Nat'l. Bank*, 314 U.S. 63, 80-81 (1941)[4] is there any variance to the rule of *Smith* v. *Sperling*, that the determination of whether or there is antagonism between the shareholder and the corporation is to be made solely from the face of the pleadings, when filed.

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[2] 237 F.2d 317, 318.

[3] 230 F.2d 228, 229.

[4] *Venner* v. *Great Northern R. Co.*, 209 U.S. 24, 30-34 (1908) decided on these same grounds, cited in *Smith* v. *Sperling* at 95, explains the exception.

There Was No Antagonism on the Merits; Westinghouse Overlooks the Facts in the Record

After trying to get around the rule of *Smith* v. *Sperling* to make a claim that antagonism arose after the pleadings were filed,[5] Westinghouse misstates the record in seeking to support that claim. The Corporation was represented before the trial court on November 27, 1979, when its motion to dismiss was granted. Yet (Br. in Opp'n., p. 3, fn.; p. 4; p. 4, fn.) Westinghouse represents to this Court that its Special Investigation Committee opposed the suit on the merits before the dismissal.[6] In fact, except for the Corporation's procedural motions, for a stay of discovery and to dismiss for lack of jurisdiction, both Westinghouse and the Committee remained

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[5] Westinghouse does not dispute that in its response it was sympathetic to the shareholder's Rule 23.1 demand. Nor does it dispute that the filing of the response in an amendment to the complaint related back to the original time of the filing, under F.R.C.P. 15.

[6] The dismissal order was issued from the bench on November 27, 1979. *Tucker* v. *Nat'l. Linen Service,* 188 F.2d 502 (5th Cir. 1951) (Br. in opp'n., Pt. II, p. 6), and its earlier version, *Tucker* v. *New Orleans Laundry,* 503 F.2d 265 (5th Cir. 1951), was also a case charging wrongdoing by corporate directors, 90 F. Supp. 290, at 293; 92 F. Supp. 502 at 503-505. Also, as stated in *Doctor* v. *Harrington,* 196 U.S. 579, 586 (1905), a shareholder is presumed to be a citizen of the state in which the corporation was created, absent charges of wrongdoing, at p. 587.

The docket shows a minute order entered as of that date. (Westinghouse's Brief before the Court of Appeals, opposing emergency relief, dated December 13, 1979, pp. 5-6, are set out in full as an Appendix to the Reply.)

On November 29, 1979, when petition moved for reconsideration, counsel for Westinghouse represented that at that very moment, the Committee made its decision. Nothing was filed to show any basis for any such action by the Committee.

On December 7, 1979, the trial court issued written opinions, one on the dismissal, and the other on denial of reconsideration (App. to the Petition).

neutral on the merits. No citation is offered by Westinghouse to support a claim that these proceedings constitute the requisite antagonism. Petitioner, in the procedural steps below following the filing of the complaint, never charged wrongdoing by Westinghouse management.

Finally, Westinghouse concedes that Eckert, Seamans had a conflict of interest, and could not conduct the investigation of petitioner's demand—it would have been futile for petitioner to await action by that firm. Thus, the corporation confuses these facts with the futility found in cases such as *Smith* v. *Sperling* or *Swanson* v. *Traer*, where there are charges of wrongdoing by corporate management, and the facts in the present case, where there was no such charge.

Westinghouse's claim of antagonism is reduced to its charge that its failure to file this action is itself antagonism. But there is no substance to this claim. Westinghouse quotes from p. 447 of the opinion of the Second Circuit in *Lewis* v. *Odell*, 503 F.2d 445, but fails to include this language—which shows the conflict with the decision of the Seventh Circuit below:

> The nature of the dispute is such that none of the trustees [there the corporate management] will be harmed by a judgment for plaintiff or has any reason to oppose the suit. The pleadings do not disclose any antagonism. The [corporation] has not only retained neutrality in its responses to appellant's complaints but has even reserved the right to take control of the action. Indeed, the [corporation] has not even "refuse[d] to take action," for appellant has never made any demand on it. We could reverse the district court only by making the "mechanical determination" that as a matter of law a corporation is antagonistic to a shareholder's derivative suit whenever it does not actively join the action as a plaintiff. *Smith* and *Swanson* forbid such a holding.

CONCLUSION

The Court should order the judgment below reversed and provide that unless a shareholder in a derivative shareholders action charges wrongdoing by management, the corporation, for determination of diversity of jurisdiction, is to be realigned as a party plaintiff, and the citizenship of the shareholder who initiated the action, under these circumstances, is to be ignored.

Respectfully submitted,

MARSHALL PATNER
55 East Monroe Street
Suite 4005
Chicago, Illinois 60603
312/372-6475

Attorney for Petitioner

APPENDIX

On October 24, 1979, Westinghouse moved to dismiss plaintiff's complaint for lack of subject matter jurisdiction pursuant to Rule 12(b) (1) of the Federal Rules of Civil Procedure. Plaintiff countered by serving motion papers seeking to disqualify the Special Investigation Committee. A hearing was held on November 27 before Judge McGarr with respect to the pending motions, at which time he stated that he was granting the motion to dismiss. A minute order to that effect was entered that day which stated that a memorandum opinion and order would follow.

On November 28, 1979, plaintiff served motion papers requesting: (1) reconsideration of Judge McGarr's decision dismissing the action; (2) a stay, temporary restraining order, or preliminary injunction against issuance of the Committee's report pending appeal, pursuant to F.R.App.P. 8 (c); and (3) leave to send a notice to Westinghouse shareholders advising them of the dismissal and seeking to substitute a new plaintiff. The following day, November 29, plaintiff's

newest motion was presented to Judge Perry acting as emergency judge in place of Judge McGarr, and a briefing schedule was established.

Also, on November 29, 1979, the Committee met and concluded that the instant action should not be pursued further. That fact was reported to the district court at the November 29 hearing by counsel for Westinghouse, who stated:

> "It is my understanding — and I had to come in -- I was in fact cut short (in my telephone conversation) -- that the committee has now reached a decision that it does not want this action to continue."

The district court, on December 7, 1979, entered two memorandum opinions and orders. The first, a copy of which is attached as Exhibit C, granted the motion to dismiss. The second, a copy of which is attached as Exhibit D, denied the motion to reconsider and stated that since the Court did not have jurisdiction, it could not entertain the other requests for relief. Thus, the Court denied plaintiff's motion "in toto."